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In the Supreme Court of the United States

OCTOBER TERM, 1981

DORIS MARIE DARVILLE, ET AL AND
MARYLAND CASUALTY COMPANY,
Petitioners,

versus

TEXACO, INC. AND C. A. REISDORF,
Respondents.

Petition For A Writ Of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Does limiting a plaintiff solely to a cause of action for workers' compensation, on the basis that he was a statutory employee of a principal contracting with his direct employer when he was injured in the course and scope of his employment, violate his right to Equal Protection under the Fourteenth Amendment to the Constitution of the United States when a direct employee of the principal injured with the statutory employee by the same cause could have causes of action for wrongful death and for workers' compensation?

2. Did the Court of Appeals for the Fifth Circuit err as a matter of law and fact in upholding the grant of summary judgment, holding that the decedent of petitioners, Doris Marie Darville and her children,[1] was the statutory employee of the respondent, Texaco, Inc., when he was killed in the course and scope of his employment?

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[1] The parties to the proceeding in the Court of Appeals for the Fifth Circuit sought to be reviewed herein not listed in the caption of the case in this Court are the four minor children of petitioner, Doris Marie Darville, Marvis Darville, Tiki Darville, Bryan Darville, and Austin Darville, Jr.

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Petitioners, Doris Marie Darville, her minor children, Marvis Darville, Tiki Darville, Bryan Darville, and Austin Darville, Jr., and Maryland Casualty Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 29, 1982.

(Parent co.)
American General Corporation

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 674 F.2d 443, is reprinted in the Appendix hereof.

The denial of rehearing by the Court of Appeals for the Fifth Circuit is reprinted in the Appendix hereof.

No opinion was rendered by the District Court for the Eastern District of Louisiana.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 29, 1982. A timely petition for rehearing was denied on May 26, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TEXT OF AUTHORITIES INVOLVED

Fourteenth Amendment to United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LSA-R.S. § 23:1032:

Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope

of his employment; and 2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section. Amended by Acts 1976, No. 147 § 1.

LSA-R.S. §23:1061:

Principal contractors; liability.

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

STATEMENT OF THE CASE

On December 3, 1979, Austin Darville died in an explosion which occurred while he was vacuuming the American Petroleum Institute (API) Separator at Texaco, Inc.'s refinery at Convent, Louisiana. Darville was employed as a vacuum truck operator by Louisiana Vacuum Services, Inc. His employer was under contract with Texaco to furnish, maintain and operate vacuum trucks, on a call-out basis, to remove acid, caustic oil, water, sludge, liquid hydrocarbons, and their mixtures accumulating in the API Separator. Under this contract Louisiana Vacuum Services, Inc. agreed to indemnify Texaco and hold it harmless against all claims arising from the contract, including workers' compensation claims. Darville's wife, Doris Marie Darville, individually and on behalf of their four minor children, filed a diversity action against Texaco, Inc. and one of its executive officers, C. A. Reisdorf, on tort theories of negligence, strict liability, and intentional tort, arising from Darville's death. Maryland Casualty Company, Louisiana Vacuum Services' workers' compensation insurer, intervened on behalf of the plaintiffs.

Texaco moved for summary judgment, claiming statutory employer status conferring tort immunity under Louisiana workers' compensation law. In support of this motion, Texaco filed the affidavit of its plant manager at Convent, which attested that at eight of Texaco's eleven other refineries in the United States, Texaco personnel are

utilized in the vacuuming operation performed under contract by Louisiana Vacuum Services, Inc. at the Convent refinery. It was uncontested that, at Convent, no Texaco personnel were used in the course of that vacuuming work. In opposition to Texaco's motion, the plaintiff offered affidavits attesting that, when Darville died, oil refineries in Louisiana generally contracted with vacuum service companies to obtain vacuum truck service for such units at APR Separators and that such vacuuming of waste sludge from separators is not part of the manufacturing process of converting crude oil into petroleum products. The District Court granted Texaco's summary judgment, holding that there was no genuine factual dispute and that Texaco was Darville's statutory employer, and, as such, immune from suit for tort damages. The Court of Appeals upheld the grant of summary judgment on that basis.

REASONS RELIED ON FOR GRANTING THE WRIT

The Court should grant the writ because of the importance of the issue and the existence of a direct conflict within the Court of Appeals for the Fifth Circuit. See *Williams v. Shell Oil Co.*, 677 F.2d 506 (5th Cir. 1982) and cases cited therein. This intra-circuit conflict is an important reason for granting the writ because the issue is a recurrent one within the Fifth Circuit, where the oil exploration and refining industry is so highly concentrated and so highly dangerous.[2] Cf. *Maggio v. Zeitz*, 333 U.S. 56,

[2] See the article on the oil industry in Louisiana in the August 8, 9, and 10, 1982 issues of the Times-Picayune-States-Item, New Orleans, Louisiana, wherein it was reported that the oil industry is the most dangerous in the United States, exceeding even mining in its death and injury toll.

59-60 (1948).

Louisiana workers' compensation law (LSA-R.S. § 23:1061) is nearly unique in the extent to which it extends to principals contracting for special services immunity from tort actions by the contractors' employees injured while carrying out the contracted work. See Larson, The Law of Workmen's Compensation, §§49.12, 72.31. The test for determining statutory employers was sent out by the Fifth Circuit in *Blanchard v. Engine & Gas Compressor Services, Inc.*, 613 F.2d 65, 71 (5th Cir. 1980) after the Louisiana Supreme Court refused to answer the question when it was certified to it. Judge Brown expressed his court's quandary in the face of the flood of litigation involving this issue as follows:

> Although in practice—at least as we see it in the flood of diversity and maritime or quasi-maritime cases—the purpose of the section is urged, looked upon or held to be immunity to traditional third party tort liability, the true purpose of this provision, as long ago described (and since many times echoed) in Horrell v. Gulf & Valley Cotton Oil Company, Inc., 15 La.App. 603, 610, 131 So. 709, 714 (1930) is:
>
> > to protect employees of minor contractors against the irresponsibility of their immediate employers by making the principal employer, who has general control of the business in hand, liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on.

> Coincident with this responsibility placed on the statutory employer, the Louisiana Workman's Compensation Act, LSA-R.S. 23:1032 (West Supp. 1979), limits a contractor's employee's recovery to the compensation benefits. The result is that a statutory employer cannot be sued in tort. Of course, the "exclusive remedy" defense will not bar a tort action against the principal if it is not a statutory employer, that is, if the work performed by the contractor was not part of the defendant's "trade, business or occupation."

Judge Tate, in *Shell, supra*, at p. 508 discussed the point further:

> While much of the litigation concerning section 1061 has occurred in suits where the injured worker is claiming a tort remedy against a defendant who raises the exclusivity of compensation as a defense, that was not the primary purpose of the statute. The fundamental purpose behind the liability of a principal to the employees of a contractor is to prevent principals from contracting out their work in order to evade liability for workmen's compensation benefits to the employees who actually perform the principal's business by interposing an impecunious independent contractor or subcontractor between the principal and his employee. Malone and Johnson, Louisiana Civil Law Treatise: Workers' Compensation, §§ 121-127 (2d ed. 1980). To this end, the coverage had been liberally construed. However, "it is well to keep in mind the purpose of Section 1061. Ordinarily the principal should not be subjected to the compensation claims of his contractor's employees; it should rest with the contractor. It is only when the principal seeks to avoid his compensation obligation by farming

> out part of his own normal operations to a contractor that an evil arises which requires exceptional treatment. Section 1061 serves as a secondary protection for the injured worker, rather than as the primary remedy." Malone and Johnson, supra, § 126 at 262. Thus, when work is customarily done by specialized contractors, the purpose behind the rule is not violated and the reason for holding the principal directly liable in compensation exclusively does not come into play. Malone and Johnson, supra, § 78 at 144, § 126 at 262.

The only difference between this case and the Shell case is that Shell's own factual showings demonstrated a genuine factual dispute making summary judgment inappropriate.[3] However, the facts disputed were of the very same sort, and concerned exactly the same issues, as in this case, where the plaintiff's affidavits opposing the summary judgment were unquestionably admissable. How, then, can a different result be reached? We see, then, that the conflict here is quite live and real.

Furthermore, the result here not only is wrong under *Blanchard, supra*, and the law governing summary judgment, but violates the plaintiff's Equal Protection rights. Texaco says its personnel at other refineries are utilized in the same operation that led to Darville's death at Convent. Let us suppose such a Texaco employee had been working

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[3] To the extent that Judge Tate's mention of this case in footnote 8 of his opinion in *Shell, supra*, at p. 510, indicates otherwise, it is based on a misreading of the decision, overlooking the acknowledgment therein of opposing affidavits as to industry practice regarding contracting out vacuuming services.

with Darville and died in the explosion with him as a result of negligence on the part of both Texaco and Louisiana Vacuum Services. If we apply the result below, along with the body of Louisiana workers' compensation law, the result is manifestly unfair and unconstitutional. First, Darville's survivors would be limited to recovering workers' compensation benefits for his death. Those benefits would come exclusively through Darville's direct employer, Louisiana Vacuum Services, under the terms of its hold harmless contract with Texaco and Texaco's right to indemnity under LSA-R.S. § 23:1061. However, while the Texaco employee's survivors could not recover anything more than workers' compensation from Texaco, nothing would bar them from also suing Louisiana Vacuum Services (and Darville's survivors) in tort.[4]

In this hypothetical, then, under the decision below, Darville falls into a class of injured workers who are barred from any tort recovery whatsoever solely on the basis of their legal status as statutory, as opposed to direct, employees. His fellow victim of industrial negligence, however, can seek both tort damages and workers' compensation.

What is the rational distinction between them to

[4] Texaco, in turn, could seek indemnity from Louisiana Vacuum Services for the workers' compensation benefits paid to the survivors of its own direect employee and bar Louisiana Vacuum Services, Inc. from seeking contribution from Texaco as a joint tortfeasor under its hold harmless contract; and stand the very real chance of paying nothing to anyone under any circumstances, regardless of the degree of its culpability.

support such a result under the Equal Protection Clause? The fundamental basis of workers' compensation statutes is that the worker gets benefits for all work-related injuries, regardless of cause, and the employer is excused from any tort liability. However, the hypothetical above illustrates how the result below turns this quid pro quo on its head. Darville's survivors get workers' compensation from Louisiana Vacuum Services, Inc. but no chance to assess Texaco for whatever responsibility it has for his death. The dead Texaco employee, doing the same work at the same time for Texaco too, leaves his survivors a cause of action against Texaco for workers' compensation (which it can make Louisiana Vacuum Services, Inc. pay) and a cause of action in tort against Louisiana Vacuum Services, Inc. (in which Louisiana Vacuum Services, Inc. will be barred from seeking contribution from its possibly joint tortfeasor, Texaco).

In conclusion, then, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit, not merely to correct the manifest errors of fact and law therein, but to resolve the direct conflict it poses with other Fifth Circuit jurisprudence and, thereby, avoid a clearly unconstitutional, as well as contradictory result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Charles L. Chassaignaic, Wiley L. Lastrapes, Jr. and Joan G. Quinters, Chaffee, McCall, Phillips, Toler & Sarpy, 1500 First National Bank of Commerce Building, New Orleans, Louisiana 70112, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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APPENDIX "A"

Doris Marie DARVILLE, etc., et al.,
Plaintiffs-Appellants,

and

Maryland Casualty Company,
Intervenor-Appellant,

v.

TEXACO, INC., et al.,
Defendants-Appellees.

No. 81-3656
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 29, 1982.

Widow of deceased employee of vacuum service brought action individually, on behalf of her four minor children, and on behalf of decedent against oil refiner and one of its executive officers seeking to recover under theories of negligence, strict liability, and intentional tort for death of employee occurring in explosion while he was vacuuming refiner's separator. The United States District of Louisiana, Patrick E. Carr, J., granted summary judgment in favor of defendans, and plaintiff appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) under Louisiana law, refiner was decedent's "statutory employer" and thus was not subject to ex delicto action for employee's wrongful death; (2) under Louisiana law, refiner was not liable under "dual capacity" doctrine; and (3) evi-

dence did not support inference that refiner's officer may have been liable under an intentional tort standard.

Affirmed.

1. Workers' Compensation 352, 2164

Oil refiner was "statutory employer," under Louisiana law, of employee of vacuum contractor who was killed in explosion while he was vacuuming a separator at refiner's refinery since the vacuuming operation was part of refiner's trade, business, or occupation; thus workers' compensation remedy was exclusive of all other rights and remedies of employee and refiner was not subject to ex delicto action for employee's wrongful death. LSA-R.S. 23:1032, 23:1061.

2. Workers' Compensation 2162

Under Louisiana law, "dual capacity" doctrine would not be applied to sustain wrongful death action brought against deceased employee's statutory employer. LSA-R.S. 23:1032; LSA-C.C. arts. 2317, 2322.

3. Workers' Compensation 2156

In wrongful death action brought against deceased employee's statutory employer and one of its executive officers, evidence did not support inference that the officer may have been liable, under Louisiana law, under an inten-

tional tort standard, an exception to workers' compensation suit bar. LSA-R.S. 23:1032.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

The resolution of this appeal requires consideration of the "statutory employer"[1] designation under Louisiana's workers' compensation regime. In *Ortego v. Union Oil Co. of California*, 667 F.2d 1241, 1242 (5th Cir. 1982), and *Blanchard v. Engine & Gas Compressor Services, Inc.*, 613 F.2d 65, 71 (5th Cir. 1980), we stated that the proper test for answering this query is "whether the activity done by the injured employee or his actual immediate employer is part of the usual or customary practice of the principal or others in the same operational business." Relying on this standard and on the language of La.R.S. 23:1061,[1] we affirm the trial court's summary judgment in favor of the ostensible statutory employer.

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[1] La.R.S. 23:1061 prescribes:

> Where any person (in this section referred to as principal) undertakes to execute any work, which is part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his

On December 3, 1979, Austin Darville was the tragic victim of an explosion which occurred while he was vacuuming the American Petroleum Institute (API) Separator at Texaco, Inc.'s refinery at Convent, Louisiana. Darville was employed as a vacuum truck operator by Louisiana Vacuum Services, Inc. His employer was under contract with Texaco to furnish, maintain, and operate vacuum trucks, on a call-out basis, to remove acid, caustic oil, water, sludge, liquid hydrocarbons, and their mixtures accumulating in the API Separator. Doris Marie Darville, individually, on behalf of her four minor children, and on behalf of the decedent, filed this diversity action against Texaco and one of its executive officers, C. A. Reisdorf. The action is based on negligence, strict liability, and intentional tort theories.

Claiming statutory employer status, Texaco moved for summary judgment; Reisdorf also motioned for summary resolution, asserting that the plaintiff failed to raise a triable issue of fact on the intentional act theory. The

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(Footnote 1 continued)

> dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

The significance of the categorization as a "principal" or "statutory employer" under R.S. 23:1061 is found in R.S. 23:1032, which prescribes that the compensation remedy is "exclusive of all other rights and remedies" of the employee.

plaintiff filed a cross motion for summary judgment. After hearing all motions, the district court denied the plaintiff's motion and granted the defendants' motions.

Use of Summary Judgment

The plaintiff maintains that the trial court erred in granting summary judgment because a genuine dispute of material fact exists whether Texaco's trade, business, or occupation includes vacuuming and removing waste sludge from its API Separator. Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is available if the pleadings, depositions, answers to interrogatories, admissions, and affidavits filed disclose no genuine issue of material fact. *See, e.g., Volyrakis v. M/V ISABELLE*, 668 F.2d 863 (5th Cir. 1982); *Murphy v. Georgia-Pacific Corp.*, 628 F.2d 862 (5th Cir. 1980). We recently noted that '[t]ypically, whether the work performed by the injured worker's employer is part of the trade or busines of the ostensible statutory employer is an issue of fact, determined according to the circumstances of each case." *Ortego v. Union Oil Co. of California*, 667 F.2d at 1242 (*citing Barnes v. Sun Oil Co.*, 362 So.2d 761 (La.1978); *Lushute v. Diesi*, 354 So.2d 179 (La.1978)). *See Thompson v. South Central Bell Co.*, — So.2d — (La.1982). But "summary resolution of this issue is not prohibited." *Ortego v. Union Oil Co. of California*, 667 F.2d at 1242.

The record before us contains the affidavit of J. J. Lennox, Texaco Plant Manager at Convent, which attests

that all petroleum refineries use oily water collection systems. Removing hydrocarbons from the water via an API Separator or some other process is necessary; otherwise, refineries could not operate. Lennox states that the "twelve (12) Texaco refineries in the United States all have API Separators. These API Separators must periodically be cleaned in order to prevent an over-accumulation of oil sludge that would break or jam the skimmers rendering the API Separators inoperable." Louisiana Vacuum service was employed by Texaco to perform this cleaning. Lennox further attested that

> In addition to the Texaco Louisiana plant, Texaco has eleven other refineries in the United States. At ten of those eleven refineries Texaco owns one or more vacuum trucks. At nine of those refineries vacuum trucks are used to clean the API Separator. In eight of the nine refineries where vacuum trucks are used to clean the API separators, Texaco personnel are utilized in the cleaning operation.

The plaintiff offered the affidavits of Perry "Jeff" Smith, Jr., the comptroller of Louisiana Vacuum Service, and Stanley LeRoy Day, a safety professional with 26 years of experience with oil refineries in the United States. Smith stated that, to the best of his "knowledge, information and belief, in December 1979, oil refineries in Louisiana generally contracted with vacuum service companies to obtain vacuum truck service for such units as API separators, rather than owning and operating such trucks themselves." And Day testified that "the function of

vacuuming waste sludge from the American Petroleum Institute Separator ... or an equivalent 'oily water' separator, is not part of the manufacturing process of converting crude oil into petroleum products." The combination of these two affidavits, it is argued, raises two triable issues of fact concerning Texaco's statutory employer status: (1) whether the removal of sludge from the API Separator is part of Texaco's business;[2] and (2) whether Texaco's failure to perform this task with its own employees prevents the labor from constituting part of its regular business. We do not agree.

Our review of the record answers the query whether the existence of a genuine factual dispute made summary disposition inappropriate.[3] We conclude that there is no factual dispute; the real quarrel is over the application of controlling legal provisions to the established facts. Texaco concedes that it is not in the business of producing hydrocarbon and chemical sludge. But this does not mean,

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[2] At the hearing, plaintiff's counsel further explained this contention:

> This [Texaco's] operation...is the production of and transformation from crude oil into a sellable product. This vacuuming operation is vacuuming of waste sludge. It's not marketable, it's not sellable, it has nothing to do with the manufacturing process which is what they do.

[3] This distinguishes the instant matter from the recent *Thompson v. South Central Bell Telephone Co.* case in which the Supreme Court of Louisiana, reversing a summary judgment in favor of South Central Bell in a tort suit which had been granted on the basis of R.S. 23:1061, concluded "that there is a general issue as to a material fact and ... there is a reasonable inference to be drawn from the evidence under which mover is not entitled to judgment as a matter of law." — So.2d at — (footnote omitted).

as the plaintiff suggests, that the cleaning of the API Separator at Texaco's Convent refinery—which is necessary for the plant to remain on-line—is not an integral part of Texaco's trade or business. It is uncontroverted that texaco's Convent refinery could not remain operational without the vacuuming of the API Separator.

[1] In this regard, the plaintiff correctly argues that our *Blanchard* decision rejected as not controlling, the "essential to business" test for identifying work resulting in the statutory employer categorization. We also said, however, that in making this determination, "it is proper to consider all facts which would or would not suggest a statutory employment relationshp." 613 F.2d at 71. And, while not dispositive, whether "the work is essential to the business of the principal or others engaged in similar businesses, may be one such fact." *Id.* From our review of the record, we are convinced that the trial court correctly ruled; the finding that the vacuuming of sludge from the API Separator at the Convent plant is part of Texaco's "trade, business, or occupation" seems inescapable. *See, e.g., Guinn v. Progress Drilling, Inc.*, 398 So.2d 128, 130 (La.App.1981) ("It is settled that ordinary maintenance and repairs are part of an employer's regular business, trade and occupation.") (*citing Barnes v. Sun Oil Co.*, 362 So.2d 761 (La.1978); *Redler v. Louisiana Power & Light Co., Inc.*, 383 So.2d 409 (La.App.1980); *Duplechin v. Pittsburgh Plate Glass Co.*, 265 So.2d 787 (La.App.1972)). *See also Perry v. Texaco Co.*, 320 So.2d 310 (La.App.1975); *Allen v. United States Fire Ins. Co.*, 222 So.2d 887

(La.App.1969).

The second point of error raised with respect to the statutory employer decision by the district court stems from Smith's uncontroverted testimony that Texaco always contracted out the vacuuming work at Convent. Standing alone, this statement is not sufficient to raise a triable issue of fact, and "will not preclude the application of § 1061, provided all other evidence indicates the activity is an integral part of the principal's business." *Blanchard v. Engine & Gas Compressor Services, Inc.*, 613 F.2d at 71. *See Guinn v. Progress Drilling, Inc.*, 398 So.2d at 130 ("the determination of whether a principal is the statutory employer of a contractor's employee is not dependent upon the principal having employees performing the same task").

As a matter of fact and law, Texaco was Austin Darville's statutory employer at the time of his fatal accident. Accordingly, it is not subject to an ex delicto action for his wrongful death.

Strict Liability and Intentional Acts

[2] In the alternative, the plaintiff argues that Texaco, shielded from a negligence action as a statutory employer, is liable under Louisiana Civil Code articles 2317 and 2322 and calls for an invocation of the "dual capacity" doctrine, which allows an injured employee to sue his employer if the employer breached a duty owed to the

employee outside the employment relation. While the Supreme Court of Louisiana apparently has not addressed the issue, the state's intermediate appellate courts have rejected the doctrine. *See, e.g., Courtney v. BASF Wyandotte Corp.*, 385 So.2d 391 (La.App.), *cert. denied*, 386 So.2d 3591 (La.1980); *Hebert v. Gulf States Utilities Co.*, 369 So.2d 1104 (La.App.1979); *Atchison v. Archer-Daniels-Midland Co.*, 360 So.2d 599 (La.App.), *cert. denied*, 362 So.2d 1389 (La.1978). In view of these decisions, and mindful of R.S. 23:1032's exclusivity rule, we affirm the district court's correct use of the summary judgment vehicle.

The final issue raised is the plaintiff's complaint that the trial court erred in granting Reisdorf's motion for summary judgment because an intentional tort action, which is an exception to the worker's compensation suit bar, is available. The plaintiff maintains that since Reisdorf was Texaco's general manager for the Southern Region of the United States at the time of the accident, he had ultimate control over safety regulations and violations at the Convent refinery. Apparently, if certain safety measures had been instituted at the Convent refinery, the explosion which killed Darville might have been avoided. As a consequence, the plaintiff argues that Reisdorf—who had access to information that indicated gas tests were needed to maintain safe conditions around the API Separator but did not correct the situation—may be liable under the intentional tort exception to the Workers' Compensation Act. We cannot agree.

[3] The Supreme Court of Louisiana recently had the occasion to discuss in-depth the meaning of "intent," for the purposes of the intentional act exception established by an amendment to La.R.S. 23:1032. The court, in *Bazley v. Tortorich*, 397 So.2d 475, 481 (la.1981), wrote:

> The meaning of "intent" is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be to that result. Thus, intent has reference to the consequences of an act rather than to the act itself.

(Citations omitted.) According to one Louisiana intermediate appellate court, which has confronted the intentional act issue in the R.S. 23:1032 context in three opinions since the supreme court's decision, *Bazley* "concluded that the words 'intentional act' meant the same as 'intentional tort' in reference to civil liability." *Cortez v. Hooker Chem. & Plastics Corp.*, 402 So.2d 249, 251 (La.App.1981). *See Mayer v. Blue Cross Ins. Co., Inc.*, 402 So.2d 273 (La.App.1981); *Bazley v. Silverman*, 402 So.2d 228 (La.App.1981). Using these guides, the evidence does not support the inference that Reisdorf may be liable under an intentional tort standard. The district court was correct.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 81-3656

D. C. Docket No. CA-79-5118-"J"

Doris Marie DARVILLE, etc., et al.,
Plaintiffs-Appellants,

and

Maryland Casualty Company,
Intervenor-Appellant,

v.

TEXACO, INC., et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that Intervenor-Appellant pay to Plaintiffs-Appellants, the costs on appeal to be taxed by the Clerk of this Court.

April 29, 1982

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-3656
Summary Calendar

DORIS MARIE DARVILLE, ETC., ET AL.,
Plaintiffs-Appellants,

and

MARYLAND CASUALTY COMPANY,
Intervenor-Appellant,

versus

TEXACO, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITIONS FOR REHEARING

(MAY 26, 1982)

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/S/HENRY A. POLITZ
United States Circuit Judge